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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JULIAN MICAH BULLARD,

Defendant and Appellant.

E065918

(Super.Ct.No. FVI1200894)

OPINION

APPEAL from the Superior Court of San Bernardino County. John P. Vander Feer, Judge. Affirmed.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Meagan J. Beale, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Julian Micah Bullard appeals from an order of the superior court denying his petition (Pen. Code, § 1170.18) to reduce his felony conviction for unlawful driving or taking a vehicle (Veh. Code, § 10851, subd. (a)) to a misdemeanor under the Safe Neighborhoods and Schools Act (Proposition 47). (§ 1170.18.) On appeal, defendant argues that his conviction for violating Vehicle Code section 10851 is properly considered a theft offense under Proposition 47, and therefore he was entitled to reduce his conviction to a misdemeanor. We reject defendant's contentions and affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND¹

In April 2012, defendant stayed overnight at his girlfriend's residence in Apple Valley, California. On the morning of April 11, 2012, defendant took his girlfriend's car keys from her purse without her permission and took her 1993 Lincoln Towncar while she was not home. Later that night, hours after his girlfriend reported the vehicle stolen, defendant agreed to meet his girlfriend and return her vehicle. Police were waiting for defendant at his girlfriend's place of employment when he showed up to drop off the vehicle and arrested him. The vehicle had approximately 260,000 miles on it and was valued at \$500.

On April 13, 2012, a felony complaint was filed charging defendant with one count of felony unlawful driving or taking of a 1993 Lincoln Towncar (Veh. Code,

¹ The factual background is taken from the police report.

§ 10851, subd. (a); count 1) and one count of felony receiving a stolen motor vehicle (Pen. Code, § 496d, subd. (a); count 2).

On April 23, 2012, defendant entered into a plea agreement and pled guilty to count 1. As a term of the plea, the remaining charge was dismissed and defendant was sentenced to county jail for the low term 16 months with credit for time served.

In November 2014, the voters approved Proposition 47, which allows certain defendants convicted of specified theft- or drug-related felonies to petition to have those convictions treated as misdemeanors. On March 9, 2016, after he had completed his sentence, defendant filed a petition for resentencing, requesting that his conviction for unlawful driving or taking of a vehicle be redesignated as a misdemeanor. (Pen. Code, § 1170.18, subd. (f).) The People opposed defendant’s petition on the ground that “VC 10851 is not affected by Prop. 47.”

On April 15, 2016, following a hearing, the trial court denied defendant’s petition, finding Vehicle Code section 10851, subdivision (a), is “not affected by Prop. 47.”

II

DISCUSSION

A. *Standard of Review*

In interpreting a voter initiative such as Proposition 47, “we apply the same principles that govern statutory construction. [Citation.] Thus, ‘we turn first to the language of the statute, giving the words their ordinary meaning.’ [Citation.] The statutory language must also be construed in the context of the statute as a whole and the

overall statutory scheme. [Citation.] When the language is ambiguous, ‘we refer to other indicia of the voters’ intent, particularly the analyses and arguments contained in the official ballot pamphlet.’ [Citation.]” (*People v. Rizo* (2000) 22 Cal.4th 681, 685; *People v. Marks* (2015) 243 Cal.App.4th 331, 334.)

B. *Overview of Proposition 47 and Penal Code Section 1170.18*

On November 4, 2014, the voters approved Proposition 47, which went into effect the next day. (Cal. Const., art. II, § 10, subd. (a); *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) Proposition 47 reduced certain drug- and theft-related crimes from felonies or wobblers to misdemeanors for qualified defendants and added, among other statutory provisions, Penal Code sections 490.2 and 1170.18. (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108.)

Under Penal Code section 1170.18, subdivision (f): “A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under [Proposition 47] had [Proposition 47] been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors.” (Pen. Code, § 1170.18, subd. (f); *People v. Diaz* (2015) 238 Cal.App.4th 1323, 1329.)

Under Penal Code section 490.2, subdivision (a): “Notwithstanding [Penal Code] Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed

nine hundred fifty dollars (\$950) shall be considered petty theft and shall be punished as a misdemeanor”

C. *Applicability of Proposition 47 to Vehicle Code Section 10851 Offenses*

Penal Code section 1170.18, subdivision (a), lists the offenses for which relief may be appropriate: “Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code.” Vehicle Code section 10851 is not one of the listed offenses. Defendant nonetheless contends that because Vehicle Code section 10851 is a theft offense, and Penal Code section 1170.18 explicitly applies to theft offenses through Penal Code section 490.2 when the value of the stolen property is less than \$950, Penal Code section 1170.18 must also apply to violations of Vehicle Code section 10851.

The California Supreme Court is currently reviewing whether a felony conviction for violating Vehicle Code section 10851, subdivision (a), may be reduced to misdemeanor petty theft (Pen. Code, §§ 490.2, 1170.18), and whether the defendant may be resentenced on a Vehicle Code section 10851, subdivision (a) conviction as if convicted of misdemeanor petty theft.² More recently, in *People v. Saucedo* (2016) 3 Cal.App.5th 635, 647-654 (*Saucedo*), the Fifth District, and in *People v. Johnston* (2016)

² See, e.g., *People v. Page* (2015) 241 Cal.App.4th 714, review granted January 27, 2016, S230793, *People v. Haywood* (2015) 243 Cal.App.4th 515, review granted March 9, 2016, S232250, *People v. Ortiz* (2016) 243 Cal.App.4th 854, review granted March 16, 2016, S232344, and *People v. Solis* (2016) 245 Cal.App.4th 1099, review granted June 8, 2016, S234150.

247 Cal.App.4th 252, 256-259, review granted July 13, 2016, S235041,³ the Third District held that a felony conviction for violating Vehicle Code section 10851, subdivision (a), does not come within the ambit of Penal Code section 1170.18 and is ineligible for misdemeanor resentencing or misdemeanor redesignation under Proposition 47, regardless of the facts of the crime or the value of the vehicle involved. Until the California Supreme Court rules on the issue, we adhere to the view that no felony conviction for violating Vehicle Code section 10851 can be reduced to misdemeanor petty theft or qualify for resentencing as misdemeanor petty theft under Penal Code section 1170.18.

As a matter of statutory interpretation, all Vehicle Code section 10851 convictions, including both theft- and nontheft-based convictions, are ineligible for reduction in accordance with section 8 of Proposition 47. (See Voter Information Guide, Gen. Elec. [Nov. 4, 2014] text of Prop. 47, § 8, p. 72 [adding Pen. Code, § 490.2] <<http://vig.cdn.sos.ca.gov/2014/general/pdf/complete-vig.pdf>> [as of Nov. 30, 2016].) As noted, Penal Code section 1170.18 does not include Vehicle Code section 10851 as one of the enumerated offenses eligible for resentencing. Penal Code section 490.2, added by Proposition 47, also does not mention that Vehicle Code section 10851 is eligible to the limited extent a Vehicle Code section 10851 offense might qualify as a petty theft under Penal Code section 490.2. Furthermore, Vehicle Code section 10851 is not strictly a theft statute. It applies to thefts, as well as to nontheft offenses, such as

³ California Rules of Court, rules 8.1105 and 8.1115.

driving someone's car without consent and without the intent to permanently deprive the owner of the car, as occurred in this case. (Veh. Code, § 10851, subd. (a); see *People v. Garza* (2005) 35 Cal.4th 866, 876 (*Garza*) [Veh. Code, § 10851, subd. (a), “ ‘proscribes a wide range of conduct,’ ” and may be violated “ ‘either by taking a vehicle with the intent to steal it or by driving it with the intent only to temporarily deprive its owner of possession (i.e., joyriding).’ ”].)

For this reason, the sole fact that one has violated Vehicle Code section 10851 does not demonstrate one has obtained any property by theft under the ordinary meaning of the term. (See *Garza, supra*, 35 Cal.4th at p. 881 [finding that “once a person who has stolen a car has [completed their journey from the locus of the theft], further driving of the vehicle is a separate violation of [Vehicle Code] section 10851 [, subdivision](a) that is properly regarded as a nontheft offense for purposes of the dual conviction prohibition of section 496(a)”]; *People v. Allen* (1999) 21 Cal.4th 846, 862, 865-866 (*Allen*) [burglary accomplished by entering home with intent to commit theft is not functional equivalent of theft offense and, thus, does not prevent concomitant conviction for receiving stolen property obtained in burglary].) Regardless of the underlying conduct supporting the conviction, the statutory requirements for conviction lack all the elements of common law theft because a violation of Vehicle Code section 10851 can be fully and completely satisfied whether or not the required intent for theft has been proven.

Under Penal Code section 490.2, one is guilty of petty theft when “obtaining any property by theft where the value of the money, labor, real or personal property taken

does not exceed nine hundred fifty dollars (\$950).” The ordinary meaning of “obtaining any property by theft” in this context is clear. One obtains property by theft when the crime they commit is one of the common-law crimes covered by California’s theft statute. (Cf. *Allen*, *supra*, 21 Cal.4th at pp. 863 [holding the term “theft” in Pen. Code, § 496 was limited to “the meaning the term has in the general theft statute”].) Thus, if one’s conviction does not necessarily require a conviction for theft, the property has not been obtained by theft. Vehicle Code section 10851 does not require a theft occur for conviction. Upon a conviction of the law generally, one is not guilty of obtaining any property by theft because the law has not required proof of intent to permanently deprive and, thus, none of the crimes covered by California’s theft statute have been necessarily met.

Relying on *Garza*, *supra*, 35 Cal.4th 866, defendant argues that the California Supreme Court has held that a violation of Vehicle Code section 10851 constitutes theft. However, as our colleagues in *Sauceda*, *supra*, 3 Cal.App.5th 635 at pages 648 to 650 at length analyzed, *Garza* is distinguishable in the context of Proposition 47. We agree with the analysis in *Sauceda* and find defendant’s reliance on *Garza* misplaced.

A conviction under Vehicle Code section 10851 does not require an explicit determination of intent to steal. Thus, evidence of theft is unnecessary to satisfy the elements needed for conviction. The fact that, in some limited circumstances, Vehicle Code section 10851 can serve as a lesser included offense to theft of an automobile (whether grand or petty theft under Proposition 47), does not change the fact that the

ultimate conviction is not necessarily for a theft offense. Because Vehicle Code section 10851 is not by its nature a theft offense, its exclusion from Proposition 47 confirms there was no intent to modify the punishment scheme separately set forth for the crime of unlawfully driving or taking a vehicle.

Thus, we conclude defendant's Vehicle Code section 10851, subdivision (a) conviction is not entitled to redesignation under Proposition 47.

III

DISPOSITION

The order denying defendant's Proposition 47 petition is affirmed.

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RAMIREZ

P. J.

I concur:

CODRINGTON

J.

MILLER, J., Dissenting and Concurring.

I respectfully dissent to that part of the majority opinion finding that Proposition 47 does not apply to all convictions under Vehicle Code section 10851. Some convictions of Vehicle Code section 10851 constitute theft offenses. (*People v. Garza* (2005) 35 Cal.4th 866, 881.) Assuming that a defendant takes a vehicle with the intent to permanently deprive the owner of the vehicle and it is valued under \$950, such violation would constitute a violation of Penal Code section 490.2, petty theft, which was added by Proposition 47. Under Proposition 47, defendant was entitled to prove he would have been guilty of a misdemeanor violation of Vehicle Code section 10851.

I concur in the result that defendant's petition to recall his sentence was properly denied by the trial court as defendant failed to meet his burden of establishing the vehicle he took was valued under \$950, and that he intended to permanently deprive the owner of the vehicle.

MILLER

J.